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No. 808

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IN THE

SUPREME COURT OF THE UNITED STATES

ARLAN'S DEPARTMENT STORE OF LOUISVILLE, INC., EVANS FURNITURE COMPANY . . . Appellants

versus

COMMONWEALTH OF KENTUCKY . . . Appellee

ON APPEAL FROM
THE COURT OF APPEALS OF KENTUCKY

MOTION TO DISMISS AND BRIEF
On Behalf of Appellee

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November 6, 1962

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1962

No. 503

ARLAN'S DEPARTMENT STORE
OF LOUISVILLE, INC.
EVANS FURNITURE COMPANY - - - *Appellants*

vs.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

ON APPEAL FROM
THE COURT OF APPEALS OF KENTUCKY

MOTION TO DISMISS AND BRIEF

Motion to Dismiss

Appellee, Commonwealth of Kentucky, moves the Court to dismiss the appeal upon the ground it does not present a substantial federal question, in that the question has been settled by prior decisions of this Court [Rule 16.1(c)].

The Question. The constitutionality of Kentucky's Sunday Closing Law [KRS 436.160].

Brief in Support of Motion

Where the constitutional question sought to be appealed has previously been ruled upon by this Court, the appeal has been dismissed upon the ground that the constitutional question presented is not substantial in character.

Zucht v. King,
260 U.S. 174, 176; 67 L. Ed. 194, 198; 43 S.Ct. 24 (1922)

See Frankfurter & Landis, The Business of the Supreme Court at October Term, 1929; 44 H.L.R. 1, 12-14 (1930)

Frankfurter & Hart, The Business of the Supreme Court at October Term, 1932; 47 H.L.R. 245, 260 (1933)

Stern & Gressman, Supreme Court Practice, pp. 214, 215 (1950)

The question as to the constitutionality of the Sunday Closing Laws of three states was at one time decided by this Court in four cases just last year (1961).

McGowan v. Maryland,
366 U.S. 420, 6 L. Ed. 2d 393, 81 S.Ct. 1101 (Md.)

Gallagher v. Crown Kosher Super Market,
366 U.S. 617, 6 L. Ed. 2d 536, 81 S.Ct. 1122 (Mass.)

Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 6 L. Ed. 2d 551, 81 S.Ct. 1135 (Penn.)

Braunfeld v. Brown,
366 U.S. 599, 6 L. Ed. 2d 563, 81 S. Ct. 1144 (Penn.)

The only material difference between the laws of these states and that of Kentucky, insofar as a constitu-

tutional question is involved, is that the Kentucky law exempts,

> "Persons who are members of a religious society which observes as a Sabbath any other day in the week than Sunday. . . . " [KRS 436.160(2)]

Like the laws of Maryland, Massachusetts and Pennsylvania, Kentucky's law provides a penalty for,

> "Any person who works on Sunday . . . or employs any other person . . . . " [KRS 436.160(1)]

The Kentucky statute excepts from its operation "ordinary household duties, work of necessity or charity" [KRS 436.160(1)] and "amateur sports, athletic games, operation of moving picture shows, chautauquas, filling stations or opera" [KRS 436.160(3)].

The Kentucky law has been upheld by the Kentucky Court of Appeals in a long line of decisions, the last of which is the case at bar.

The Commonwealth v. The Louisville and Nashville Railroad Co., 80 Ky. 291 (1882)

Capital Theater Co. v. Commonwealth, 178 Ky. 780, 199 S.W. 1076 (1918)

Strand Amusement Co. v. Commonwealth, 241 Ky. 18, 43 S.W. 2d 321 (1931)

Commonwealth v. Phoenix Amusement Co., Inc., 241 Ky. 678, 44 S.W. 2d 830 (1931)

City of Harlan v. Scott, et al., 230 Ky. 585, 162 S.W. 2d 8 (1942)

Commonwealth v. Arlan's Dept. Store of Louisville, et al., Ky., 357 S.W. 2d 708 (1962)

And as said in McGowan v. Maryland, supra, 366 U.S. at pp. 510, 511, in the concurring opinion of Justices Frankfurter and Harlan:

> . . . But this does not mean that we are to be indifferent to the unanimous opinion of seven

> tions of judges who, in the conscientious discharge of obligations as solemn as our own, have sustained the Sunday laws as not inspired by religious purpose. * * * "

There is nothing in the majority opinions of the McGowan, Gallagher, Two Guys or Braunfeld cases, supra, that indicates a Sunday statute which by its toleration does not penalize a Sabbatarian by requiring him to close on Sunday is unconstitutional. Those opinions, on the contrary, are all consistent with the constitutionality of the Kentucky statute and we therefore cite them as dispositive of the question here involved.

After noting that twenty-one of thirty-four jurisdictions make an exception in favor of those who observe some other day, the concurring opinion of Justices Frankfurter and Harlan in the McGowan case says (366 U.S. at p. 520):

> "However preferable, personally, one might deem such an exception, I cannot find that the Constitution compels it."

Other language therein similarly indicates acceptance of such an alternative.

And Mr. Justice Brennan (with whose dissent Mr. Justice Stewart agrees "substantially") indicates that the failure to provide an exception is fatal. Thus, in the Braunfeld case (366 U.S. at p. 611), he makes the following statement:

> "* * * It is the mere convenience of having every one rest on the same day. It is to defend this interest that the Court holds that a *State need not follow the alternative route of granting an exception for those who in good faith observe a day of rest other than Sunday.*" (Emphasis added.)

[1] See 366 U.S. pp. 518, 515, 517.

This reference to religion, excepting Sabbatarians, by its toleration, contains no more religious reference in substance or background than did the laws of Massachusetts or Pennsylvania and not as much as did that of Maryland.[4]

CONCLUSION

We submit therefore that this Court by its decisions in the McGowan, Gallagher, Two Guys and Braunfeld cases, supra, heretofore has decided the constitutionality of the equivalent of Kentucky's Sunday Closing Law and that appellants' appeal should be dismissed because it thereby does not present a substantial federal question.

Respectfully submitted,

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[4] Gallagher v. Crown Kosher Super Market, 366 U.S. at p. 624 [illegible] p. 625 n. 29.

[5] Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 594.

[6] McGowan v. Maryland, 366 U.S. 420 at p. 445.

PROOF OF SERVICE

I, Holland N. McTyeire, one of the attorneys for Commonwealth of Kentucky, appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of November, 1962, I served copies of the foregoing Motion to Dismiss and Brief on the appellants herein by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record as follows: To James E. Thornberry, Esq., 1011 Kentucky Home Life Building, Louisville 2, Kentucky, attorney for Arlan's Department Store of Louisville, Inc.; to Edward M. Post, Esq., Louisville Trust Building, Louisville 2, Kentucky, attorney for Evans Furniture Company.

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